ORDER PROHIBITING PERMANENT PUBLICATION OF NAMES AND IDENTIFYING DETAILS

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 229
EMPC 155/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	applications for non-publication
BETWEEN	BDX Plaintiff
AND	PZY Defendant

Hearing: On the papers

Appearances: A Mapu, advocate for plaintiff
C Rowe, advocate for defendant

Judgment: 27 November 2024

JUDGMENT OF JUDGE M S KING

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[1] These proceedings were brought as a challenge to a determination of the Employment Relations Authority (the Authority) where it determined that the plaintiff did not raise a personal grievance within the 90-day statutory timeframe and that there were no exceptional circumstances to justify granting leave to the plaintiff to raise their grievance out of time.[1] The Authority made interim non-publication orders over the names of the parties and witnesses and any information identifying them, which

1 *BDX v PZY* [2023] NZERA 160 (Member Larmer).

continue until they are either rescinded or varied by order of the Court.[2] The Court made its own interim non-publication orders on 4 October 2023.[3]

[2] The parties attended a judicial settlement conference, following which they filed a joint memorandum advising that they had resolved the matters before the Court and executed a record of settlement in accordance with s 149 of the Employment Relations Act 2000 (the Act), which was certified by a mediator. As part of their agreed resolution, the parties sought permanent non-publication orders over the parties' and witnesses' names and identifying details.

[3] On 5 July 2024 the Court issued a consent judgment settling the claims between the parties that were before it.[4] Although the Court issued the consent judgment resolving the proceedings, the parties acknowledge that the issue of non-publication is a matter for the Court and that the Court needs to be satisfied that the test for permanent non-publication orders is met. Both parties have filed an application and affidavit evidence in support of their application for permanent non-publication orders.

[4] A summary of the key grounds relied on in the applications includes:

(a) The Authority's determination refers to issues of alleged sexual harassment, the publication of which would adversely impact on the plaintiff's health and wellbeing and future employment prospects.

(b) The Authority's determination and the affidavit evidence filed in support of the plaintiff's claim refers to sensitive medical information belonging to the plaintiff, including trauma the plaintiff says they suffered from the alleged sexual harassment, the publication of which would adversely impact on the plaintiff's health and wellbeing.

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2 *BDX v PZY* [2023] NZERA 407 (Member Larmer) at [1]–[7].
3 *BDX v PZY* [2023] NZEmpC 169 at [22].
4 *BDX v PZY* [2024] NZEmpC 119.

(c) The defendant's professional and personal relationships would be adversely affected by the publication of allegations which the defendant denies.

(d) Publication will have an adverse effect on third parties referred to in the Authority determination and Court proceedings, including impacting on the health of a family member of the defendant.

(e) The parties reside in a regional town, which means that identification of one party will likely lead to the identification of the other party.

(f) The parties have settled matters as a result of a judicial settlement conference and executing a confidential record of settlement under s 149 of the Act. They have also obtained a consent judgment, which noted that the terms of the agreement are confidential to the parties and their advisers.[5] The settlement of matters between the parties reduces the public interest in the proceedings.

Legal principles

[5] The Court has the power under the Act to make non-publication orders.[6] While the Court has a broad discretion, this must be exercised consistently with applicable principles. The principle of open justice is of fundamental importance and may only be departed from to the extent necessary to serve the ends of justice.[7] Ordinarily, the Court will only order non-publication where there is a reason to believe that specific adverse consequences could reasonably be expected to occur which justify a departure from open justice.[8] The Full Court in *MW v Spiga* recently outlined two steps that assist in that analysis.

[6] The first step is an assessment of whether there is reason to believe that specific adverse consequences could reasonably be expected to occur. The necessary

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5 At [4](c).
6 Employment Relations Act 2000, sch 3 cl 12.
7 *MW v Spiga* [2024] NZEmpC 147 at [87], relying on *Erceg v Erceg [Publications restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]–[3] and [13].
8 At [88]–[89].

evaluation will focus on such evidence as has been submitted and/or is available. Inferences may be drawn by the Authority or the Court, but these must be reasonable inferences that may be taken from the evidence, based on the specific circumstances of the case, when considered in context.[9]

[7] The second step is a weighing exercise in which the Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case.[10] In conducting that weighing exercise, a number of factors may be relevant, including:[11]

(a) the circumstances of the case;

(b) the interests of the person or entity applying for a non-publication order;

(c) the interests of the other party or parties to the litigation;

(d) the interests of any third party;

(e) the public interest, including the rights of media;

(f) any further issues of equity and good conscience; and

(g) tikanga and its principles, values, or concepts.

[8] However, the underlying test for non-publication is not whether there are specific adverse consequences justifying a departure, but rather whether a departure from open justice is necessary to serve the ends of justice.[12] The Full Court in *Spiga* acknowledged that there are situations where the administration of justice and broader public interest may weigh against full openness.[13]

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9 At [88].
10 At [89].
11 At [94].
12 At [87] and [92]–[93].
13 At [92].

Analysis

[9] The plaintiff has filed an affidavit which provides detailed medical evidence that they say attests to the trauma of the alleged sexual harassment on them. The plaintiff submitted that the medical evidence before the Authority and Court is highly sensitive and that publication of such medical information and/or further details of the allegations of sexual harassment would worsen the plaintiff's medical condition, retraumatising them and preventing them from moving forward.

[10] The defendant submitted that publication of the allegations of sexual harassment, which are denied, will have a significant impact on their professional and personal relationships and will unfairly affect other former employees who are named in the allegations and that publication will aggravate the health and wellbeing of a member of the defendant's family. The defendant does not believe that there is any public interest in naming the parties or any witnesses in this proceeding.

[11] However, the defendant's evidence is that they have sold their business. They appear most concerned about the disputed allegations creating embarrassment and affecting their reputation and the reputation of their former workers. The Supreme Court has held that embarrassment caused by allegations is insufficient to justify non-publication.[14] The defendant has also failed to provide any medical certificates to support the concerns raised about their family member's medical condition. Accordingly, I find that the defendant's evidence does not establish specific adverse consequences sufficient to grant non-publication over the defendant's and witnesses' names and identifying details.

[12] The plaintiff has complained of sexual harassment. The Court has recognised that in most cases of sexual harassment, the interests of justice will require the name of a grievant, such as the plaintiff, to be protected so as not to discourage other victims.[15]

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14 *Erceg v Erceg*, above n 7, at [13].
15 *MW v Spiga,* above n 7, at [60]; and *Z v A* [1993] 2 ERNZ 469 (EmpC) at 495.

[13] However, for the defendant, the nature of such allegations goes against non-publication – there is a heightened public interest in naming the defendant. There is an argument that any future employee or employer of the defendant should be able to consider the allegations before deciding to commence an employment relationship with the defendant. However, as the Court has not had the opportunity to consider the allegations and evidence in any detail, the principle of open justice applies with less force than would be the case if the allegations had been proved.[16]

[14] The plaintiff also submits that the defendant ran a small business that is located in a regional town in New Zealand where both parties reside. The plaintiff raises real concerns that any identification of the defendant employer or the witnesses, who include former colleagues of the plaintiff, would likely lead to the identification of the plaintiff. Given the evidence, I am satisfied that identification of the defendant and witnesses would likely lead to the identification of the plaintiff.

[15] It is the health and welfare of the plaintiff that is the material factor in this instance. In the circumstances of the case, I am satisfied that publication of the parties' and witnesses' names and identifying details means that the adverse consequences identified above could reasonably be expected to occur.

[16] Next, I consider whether the adverse consequences identified above justify a departure from open justice in the circumstances of the case. That involves a weighing exercise and includes an assessment of the seven factors identified above.

[17] I have already set out the circumstances in which the plaintiff finds themselves in and have found that the plaintiff has a demonstrable interest in being able to keep their sensitive medical information private. I have found above that publication about the allegations of sexual harassment could reasonably be expected to have adverse consequences on their health and wellbeing given the circumstances of this case. The Court has previously accepted that such "specific adverse consequences" are often sufficient to displace open justice. Both of these factors weigh in favour of an order being made.

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16 *Z v A*, above n 15, at 496; and *C v Air Nelson Ltd* [2011] NZEmpC 27, [2011] ERNZ 207 at [78].

[18] The defendant supports the order being made. I have identified that there are no third-party interests that are relevant to the assessment.

[19] Given that the plaintiff raised allegations of sexual harassment, there is public interest in the plaintiff having their identity protected so as not to discourage other victims. While open justice would normally go against the name of the alleged harasser being protected, the allegations against the defendant were not proven, and publication of the defendant's name and identifying details would likely lead to the identification of the plaintiff; this goes against naming the defendant.

[20] Finally, the Court has observed that "the policy imperatives underlying the principle of open justice apply with diluted force" where, as in this case, an employment relationship problem has been settled between the parties, without needing to be resolved substantively by the Court.[17] With this in mind, the broader public interest weighs in favour of an order being made.

[21] I also consider the Court's equity and good conscience jurisdiction given the factors set out in [17] above, are in favour of an order being made.

[22] Accordingly, I consider that the facts of this particular case, and the interests engaged, are sufficient to displace the principle of open justice.

[23] It is therefore appropriate to make the non-publication orders sought.

Outcome

[24] I make the orders as set out below.

[25] Permanent non-publication orders are made in respect of both the Authority and the Court prohibiting the publication of the name and identifying particulars of the parties and witnesses. In particular:

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[17] *X v A District Health Board* [2013] NZEmpC 160 at [15]; see also *MW v Spiga,* above n 7, at [93].

(a) The plaintiff's name is anonymised as BDX by reference to a system of alphabetical identification.

(b) The defendant's name is anonymised as PZY by reference to a system of alphabetical identification.

[26] The Court file is not to be inspected by any person without leave of a judge.

[27] I direct the Registrar of this Court to draw these orders to the attention of the Authority.

[28] The parties are to advise whether there is any issue as to costs.

M S King
Judge

Judgment signed at 4 pm on 27 November 2024